

## Message Text

CONFIDENTIAL

PAGE 01 LUSAKA 02721 101117Z

12

ACTION AF-08

INFO OCT-01 EUR-12 ISO-00 IO-13 CIAE-00 DODE-00 PM-04 H-02

INR-07 L-03 NSAE-00 NSC-05 PA-01 PRS-01 SP-02 SS-15

USIA-06 /080 W

----- 018901

R 091010Z OCT 76

FM AMEMBASSY LUSAKA

TO SECSTATE WASHDC 4250

INFO AMEMBASSY DAR ES SALAAM

AMEMBASSY GABORONE

AMEMBASSY LONDON

AMEMBASSY MAPUTO

AMEMBASSY PRETORIA

C O N F I D E N T I A L LUSAKA 2721

E.O. 11652: GDS

TAGS: PINT, PFOR, ZA, WA, TZ

SUBJ: RUSTICATION OF SWAPO DISSIDENT SPARKS ZAMBIAN

JUDICIAL-EXECUTIVE CONFRONTATION

REF: (A) LUSAKA 1218; (B) LUSAKA 1740

1. INTRODUCTION-SUMMARY - IN EARLY MAY 1976, ONE-TIME SWAPO SECRETARY FOR INFORMATION, ANDRES SHIPANGA AND A NUMBER OF OTHER SWAPO ADHERENTS WERE PLACED UNDER PROTECTIVE CUSTODY BY THE GRZ "FOR THEIR OWN SAXHTY" (REFTEL A). SUBSEQUENT TO THIS, SHIPANGA FILED A WRIT OF HABEAS CORPUS SEEKING HIS AND HIS COLLEAGUES RELEASE, OR EXPLANATION FOR THEIR DETENTION BY THE GRZ. SWAPO LEADER, SAM NUJOMA, WAS ADAMANT THAT HIS SWAPO OPPONENTS SHOULD NOT BE RELEASED AND AVOWED THEY WERE AGENTS OF SOUTH AFRICA AND WEST GERMANY SEEKING TO DESTROY SWAPO (REFTEL B). AFTER A PERIOD OF SEVERAL MONTHS, THE GRZ ARRANGED FOR THE TRANSFER OF THE SWAPO DISSIDENTS TO TANZANIA, WHERE THEY ARE STILL BELIEVED TO BE. ON SEPT. 21, IN A TWO TO ONE DECISION, ZAMBIAN SUPREME COURT PANEL SET ASIDE A LUSAKA HIGH COURT'S DISMISSAL  
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PAGE 02 LUSAKA 02721 101117Z

OF SHIPANGA'S WRIT OF HABEAS CORPUS AND ORDERED THE GRZ

TO RETURN SHIPANGA TO ZAMBIA. IN A PROCEEDING BEFORE THE SUPREME COURT ON OCT. 5, GRZ ATTORNEY-GENERAL ARGUED THAT THE GRZ WAS UNABOE TO DO THE COURT'S BIDDING. THE COURT AFTER HEARING ARGUMENTATION ORDERED AGAIN THAT SHIPANGA BE RETURNED TO ZAMBIA. THE EMBASSY DOUBTS THAT THE GOVERNMENT IS ANY MORE LIKELY TO COMPLY WITH THE COURT'S OCT. 5 RULING THAN IT DID WHEN THE EARLIER ORDER WAS LAID DOWN. WHETHER THE GOVERNMENT COMPLIES OR NOT, THIS CONFRONTATION BETWEEN THE ZAMBIAN JUDICIAL AND EXECUTIVE BRANCHES HAS SURFACED SENSITIVE AND CONTROVERSIAL ISSUES AND IS LIKELY TO LEAVE RUFFLED FEADERS ON BOTH SIDES. (END INTRODUCTION-SUMMARY)

2. POSITION TAKEN BY THE COURT - THE EXECUTIVE-JUDICIAL CONFLICT IN THIS INSTANCE, SURFACED IN CONFLICTING ACCOUNTS OF SUPREME COURT'S PROCEEDINGS ON OCT. 5 AS CARRIED BY THE ZAMBIAN DAILY MAIL AND TIMES OF ZAMBIA. THE TIMES OF ZAMBIA ACCOUNT POINTS OUT THAT THERE WERE SHARP EXCHANGES BETWEEN THE ATTORNEY-GENERAL AND THE JUSTICES. AT ONE POINT IN THE ARGUMENTATION, THE DEPUTY CHIEF JUSTICE, LEO BARON (A RHODESIAN IMMIGRANT) IS REPORTED TO HAVE TOLD THE ATTORNEY-GENERAL MAINZA CHONA, THAT THE COURT'S (SEPTJ 21) DECISION HAD ALREADY OVERTAKEN OTHER PREROGATIVES AND THE JUSTICES REITERATED THAT THE GOVERNMENT OF ZAMBIA SHOULD APPROACH THE GOVERNMENT OF TANZANIA FOR SHIPANGA'S RETURN. AT THE CLOSE OF THE PROCEEDINGS, THE COURT AGAIN ORDERED THAT SHIPANGA BE RETURNED TO ZAMBIA.

3. THE GOVERNMENT'S ARGUMENTATION - GRZ ATTORNEY-GENERAL MAINZA CHONA'S DEFENSE OF THE GOVERNMENT'S INACTION WAS BASED ON AN AFFIDAVIT OF THE PERMANENT SECRETARY OF THE MINISTRY OF DEFENSE. THIS AFFIDAVIT SIDED WITH THE STAND TAKEN BY THE LEADERSHIP OF SWAPO (SAM NUJOMA) THAT THE INTEREST OF THEIR PARTY AND THE LIBERATION STRUGGLE RAGING IN NAMIBIA DEMANDED THAT SHIPANGA SHOULD CONTINUE TO RESIDE IN TANZANIA. CHONA ALSO TOLD THE COURT THAT ZAMBIA, AS DOES THE OAU AND THE U.N., REGARDS SWAPO AS THE AUTHETIC VOICE OF THE NAMIBIAN STRUGGLING MASSES. IN THIS SITUATION, "I  
CONFIDENTIAL

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PAGE 03 LUSAKA 02721 101117Z

HAVE NO DOUBT TOAT YOUR LORDS WILL APPRECIATE THAT TAKING INTO ACCOUNT THE POLITICAL POSITION AND THE CONFUSING SITUATION IN SOUTHERN AFRICA, ZAMBIA HAD DONE ALL IT COULD IN THE EFFORT TO TRY WHETHER IT WAS POSSIBLE TO BRING THE APPLICANT BACK TO ZAMBIA. THE APPLICANT IS IN TANZANIA. TANZANIA IS A SOVEREIGN INDEPENDENT COUNTRY, AND IN SPITE OF THE CLOSE FRIENDSHIP BETWEEN THE TWO COUNTRIES, ZAMZNA IS NOT IN A

POSITION TO BRING THE APPLICANT BACK INTO ZAMBIA."  
CHONA ALSO ARGUED THAT SHIPANGA AS A MEMBER OF LIBERATION  
ARMY WAS SUBJECT TO THE DISCIPLINE OF THE COLLECTIVE  
LEADERSHIP OF THE ORGANIZATION AND ONCE SWAPO DECIDED  
SHIPANGA SHOULD GO TO TANZANIA THE GRZ'S ONLY RECOURSE  
TO HOLD HIM IN ZAMBIA WOULD HAVE BEEN TO RETAIN HIM

UNDER THE PRESERVATION OF PUBLIC SECURITY REGULATIONS  
WHICH WOULD HAVE BEEN "INVIDIOUS" SINCE SHIPANRN HAD  
NOT ENGAGED IN ACTIVITIES PREJUDICIAL TO ZAMBIA'S SECURITY.

4. CONTRASTING PRESS ACCOUNTS FROM OCT. 6 PRESS BEING  
FORWARDED ADDRESSES BY AIRGRAM.

5. COMMENT: IF SHIPANGA IS NOT RETURNED AS ORDERED BY THE  
SUPREME COURT, THE JUDICIARY WILL SUFFER AN EROSION IN PUBLIC  
CREDIBILITY AS WELL AS A BRUISING OF THE PERSONAL JUDICIAL  
CONSCIENCE OF SOME JUSTICES. AT THE SAME TIME, THE GRZ MAY BE  
CONCERNED THAT ITS REFUSAL TO RETURN SHIPANGA COULD BE INTER-  
PRETED AS EVIDENCE THE GRZ, BY DEFERRING TO SWAPO'S WISHES,  
RECOGNIZES THE LEGITIMACY OF A STATE WITHIN A STATE. THIS WOULD  
BE COUNTER TO THE POSITION TAKEN BY THE GRZ IN THE ASSASSINATION  
OF HERBERT CHITEPO CASE AND STRENGTHEN THE HAND OF MUGABE/ZANU  
WHO IS PRESSURING THE GRZ TO RELEASE THOSE ACCUSED OF THE  
SLAYING. THE FACT THAT THE JUSTICES HAVE SURFACEBCA CONTROVERSY  
INVOLVING THE ISSUE OF SUPREMACY OF THE LAW AND QUESTIONED AND  
REJECTED THE ATTORNEY-GENERAL'S "ULTRA VIRES" ARGUMENTS THAT  
THE GRZ IS BOUND TO DO WHAT SWAPO WANTS BECAUSE IT IS IN THE  
INTEREST OF THE LIBERATION STRUGGLE IN NAMIBIA CLEARLY PRESENTS  
ISSUES THE GRZ WOULD PREFER NOT TO HAVE THE SUBJECT OF PUBLIC  
DISCUSSION. IT ALSO OBIQUELY CALLS TO PUBLIC ATTENTION THE  
FACT THAT THE TWO SUPREME JUSTICES WHO DECIDED AGAINST THE  
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PAGE 04 LUSAKA 02721 101117Z

GOVERNMENT ARE NON-NATIVE ZAMBIANS. LESS CLEAR IS WHAT, IF  
ANY, IMPACT THE COURT PROCEEDINGS WILL HAVE ON ATTEMPT TO  
EFFECT A RECONCILIATION BETWEEN THE SWAPO DISSIDENTS AND  
NUJOMA. AT THIS TIME, THE EMBASSY DOUBTS THAT THE GRZ WILL CAVE  
ON THIS ONE BEING AS WEDDED, AS IT IS, TO SAM NUJOMA AS SWAPO  
KINGPIN, BUT NO MATTER HOW IT COMES OUT, FEATHERS WILL HAVE  
BEEN RUFFLED ON ALL SIDES. LOW

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